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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

ALLIED CHEMICAL CORPORATION
Petitioner

v.

ANTHONY WHITE and HENRY CLARK, SR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ANTHONY WHITE and HENRY CLARK, SR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (APP A, *infra*) is reported at 538 F.2d 1094. The court of appeals denial of a petition for rehearing, and Chief Judge Brown's dissenting opinion, joined by Judge Hill (APP B, *infra*) are reported at 551 F.2d 93. The opinion of the District Court (APP C,

infra) is reported at 382 F.Supp. 309. A prior unpublished Minute Entry of the District Court is annexed as Appendix D.

JURISDICTION

The judgment of the court of appeals (APP F, *infra*) was entered on September 15, 1976. The petition for rehearing was timely filed on September 29, 1976, and was denied April 20, 1977. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether employees who entered into and signed a conciliation agreement with their employer under the supervision of the Equal Employment Opportunity Commission (EEOC) may thereafter bring an action against their employer on matters covered by the agreement, contrary to the agreement, on the grounds that they did not understand the agreement when they signed it?

2. Whether, if signatories to such an agreement may collaterally attack it, a factual hearing on the voluntariness of their entering into it is required on the mere allegations that they did not fully understand it?

3. What threshold standards must be met to set aside an EEOC conciliation agreement?

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The pertinent portions of the following relevant provisions are set forth in Appendix E:

Section 706(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(b);

Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1);

E.E.O.C. Procedural Regulations, 29 C.F.R. Part 1601, §1601.22;

E.E.O.C. Compliance Manual, §62.5(a) and (b), CCH, Paragraph 1265.

E.E.O.C. Compliance Manual, §64.1, CCH, Paragraph 1291.

STATEMENT

In October, 1971, the Petitioner entered into an extensive and lengthy Conciliation Agreement with respect to charges of employment discrimination that had been filed under Title VII of the Civil Rights Act. The Agreement provided *inter alia* for a substantial merger of certain seniority units, but did not provide for plantwide seniority.* The Agreement had been drafted by the EEOC, and had been approved by the Commission as well as the Conciliator, the District Director and the Chief of Conciliations of EEOC. Thirty-six individuals who had filed charges, including the Respondents, had the agreement explained to them by EEOC, and then executed the agreement which contained the EEOC's standard release language:

> The Charging Parties hereby waive, release, and covenant not to sue Respondent Company and/or Respondent Union with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission, subject to performance by the Respondents of the promises and representations contained herein. The Commission shall determine whether the Respondents hav complied with the terms of this Agreement. (APP A, *infra*, p. A-3)

* Total plantwide seniority is exercisable, within each seniority unit, but not between units.

Two former employees and one present employee who were not parties to the Conciliation Agreement filed suit against the Petitioner in March of 1972, seeking various relief. In May, 1973, the Respondents, one of whom had been laid off and the other reduced to a lower classification, due to a reduction in force, in accordance with the conciliation agreement's seniority terms, moved to amend the complaint and intervene as additional plaintiffs. The district court denied the intervention in its Minute Entry of December 12, 1973:

> The gist of the intervenors' position is that they entered into the EEOC agreement without proper legal advice and that they were not advised at the time of available alternate procedures. We do not believe that this is sufficient grounds for the intervenors to ignore the EEOC agreement and attempt to pursue this litigation. If they have these complaints, they may present them to the EEOC which has retained jurisdiction over the operation of the conciliation agreement, and they may, of course, receive relief from the EEOC if their claims are justified. The very purpose of the conciliation agreement was to avoid litigation insofar as all parties thereto were concerned. To permit these intervenors to come into this suit would be to ignore completely the conciliation agreement and would be to disregard completely the attempts of the EEOC to settle these matters without the necessity of litigation, which was the very purpose of the establishment of the EEOC in the first place. (Appendix D)

The court of appeals, relying heavily on this Court's decision in *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), reversed on this issue and remanded the case to the district court to conduct "a hearing to determine whether in fact [Respondents] comprehended the rights they were

relinquishing when they signed the October, 1971 EEOC conciliation agreement." (App. A, *infra*, pp. 6-7)**

The court of appeals thereafter denied the petition for rehearing with suggestion of rehearing en banc (APP B, *infra*). A dissent was filed by Chief Judge Brown, joined by Judge Hill, which aptly stated the importance of the issue for which certiorari is sought (APP B, *infra*, p. B-2):

> Why should employers enter a conciliation agreement if as to any one or more of all the thousands of employees in a large industrial plant they would have to bear the burden of proving that each employee understood what he was doing when he signed the conciliation agreement which had been negotiated and adopted under the close supervision of EEOC? By its decision the Court is injecting new ideas in the process of conciliation which will make conciliation agreements very difficult if not impossible to achieve. As I view the decision it will make employers, unions and employees very leary of the entire conciliation process to which all have expressly agreed. 551 F.2d 93, 94

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals seriously impares the effectiveness of the conciliation process established by Congress as part of Title VII of the Civil Rights Act of 1964. It is inconsistent with the act and with prior decisions of this Court.

Congress has established in Title VII of the Civil Rights Act of 1964 a carefully drawn provision for the prevention of employment discrimination and minimization of litigation. Essentially, charges of employment discrimination are brought

** There are now no remaining issues regarding plaintiffs or other intervenors.

before state or federal equal employment commissions, which are charged with seeking enforcement through conciliation and voluntary agreement. If these efforts fail, a suit against the employer may be brought either by the commission or the employees. The act provides in 42 U.S.C. §2000e-5(f)(1) that **"If . . . the commission has not entered into a conciliation agreement to which the person aggrieved is a party,** the commission . . . shall notify the person aggrieved and . . . a civil action may be brought against the respondent named in the charge (a) by the person claiming to be aggrieved . . ." (emphasis supplied).

In this case the commission **did** enter into a conciliation agreement to which the aggrieved persons, including Respondents, were parties. Thus, Respondents should have been barred from proceeding against their employer on the matters decided by conciliation. But, when Respondents were adversely affected by the agreement, they sought to avoid the agreement, claiming that the seniority provisions they had agreed to violated the act and that they should not be bound by the agreement because they had not fully understood it. (APP A, *infra*, p. A-7) Respondents would thus undo the conciliation process contemplated by the act, ignore the continued jurisdiction of EEOC over the agreement (29 C.F.R. §1601.22 and the terms of the agreement) and begin anew in court, frustrating the conciliation process and the role of the EEOC. This should not be permitted in the absence of an allegation of fraud or substantial wrongdoing by EEOC in its conciliation procedure. No such allegation was made.

Congress has placed a high priority on the role of the EEOC in the conciliation and resolution of civil rights disputes under Title VII:

> [T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. 42 U.S.C. §2000e-5(b)

In *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974) this Court recognized and emphasized the central importance of the conciliation process:

> Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

Prior to its decision in this case, the Fifth Circuit had similarly stressed the primary importance of the conciliation process in *Hutchings v. United States Industries*, 428 F.2d 303, 309 (1970):

> [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation, *Oatis v. Crown Zellerbach Corporation*, 5 Cir., 1968, 398 F.2d 496,498, on the ground that voluntary compliance is preferable to court action. *Dent v. St. Louis-San Francisco Railway Company*, 5 Cir., 1969, 406 F.2d 399, 402. Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment practices by informal means leading to voluntary compliance. See *Fekete v. United States Steel Corp.*, 3 Cir., 1970, 424 F.2d 331.

Thereafter the Fifth Circuit, in *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 847 (1975) cited this Court's

decision in *Alexander v. Gardner-Denver Company, supra,* and properly observed:

> Nor has the Supreme Court maintained detached silence in regard to the deference courts should accord the processes of voluntary conciliation and settlement.

See also *Griggs v. Duke Power Company,* 401 U.S .424, 433-434 (1971).

Yet the Fifth Circuit now relies on *Alexander v. Gardner-Denver, supra,* as authority for a decision which seriously undermines the EEOC conciliation process by undermining the finality of the EEOC's conciliation agreements. The Fifth Circuit would now permit a vast backlog of complex conciliation agreements to be reopened on the allegation that a party thereto did not fully understand the benefits he or she got, or did not get, under the agreement. Conciliation agreements, like collective bargaining agreements, may be complex and are often lengthy. It is hard to imagine any conciliation agreement that, with the assistance of hindsight and decisions in later cases, could not be reopened and re-litigated under the Fifth Circuit's decision if it is allowed to stand. If each change in legal decisions, or in an employee's willingness to be bound by his agreement, may in effect void the agreement, conciliation agreements are of little worth.

The decision of the Fifth Circuit is not required by *Alexander,* but is, in fact, contrary to it. In *Alexander* this Court held that submission of a discrimination claim to arbitration under a collective bargaining agreement does not waive the employees' rights under Title VII. The effectiveness of a Title VII conciliation agreement itself was not at issue. In *Alexander* there was no conciliation agreement. Rather, the case and the footnote relied upon by the Fifth

Circuit (footnote 15, 415 U.S. at 52) address themselves to the issue of voluntary waiver of Title VII rights in a private proceeding outside of Title VII. This dicta cannot serve as the basis for striking down conciliation agreements under Title VII itself. In *Alexander,* this Court noted that deferral to arbitration "might adversely affect . . . the enforcement scheme of Title VII." 415 U.S. at 59. Here, it is this "scheme of Title VII" which the Fifth Circuit's decision would adversely affect.***

The court of appeals did not have the benefit of this Court's further views on the significance of the conciliation process and the EEOC's role therein, expressed in *Occidental Life Ins. Co. v. EEOC,* —— U.S. ——, 45 LW 4752.

> "When Congress first enacted Title VII in 1964 it selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" the goal of equality of employment opportunities. *Alexander v. Gardner Denver Co.,* 415 U.S. 36, 44. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Ibid.* Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in §706 of the amended Act. Thus, under the procedural structure

*** In addition to its inapposite reliance on **Alexander**, the Fifth Circuit also relied on its own decision in **Watkins v. Scott Paper Company**, 530 F.2d 1159 (5th Cir. 1976). **Watkins** is readily distinguished. The employees in Watkins had not executed a conciliation agreement pursuant to Title VII, but only a statement that a memorandum under Executive Order 11246, previously executed among the employer, the union and the Department of Labor's Office of Federal Contract Compliance, had been explained to them. Nor had they received the guidance or assistance of an EEOC conciliator, as had Respondents herein. Rather, they were advised by two fellow employees, one a personnel supervisor and the other a local union official.

> created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion."

In weighing the deference to be granted this "scheme", the role of the EEOC on behalf of charging parties in the conciliation process cannot be underestimated. This role has been described by the EEOC's first Chief of Conciliation:

> [I]n this process, **the conciliator functions as both an advocate for the charging party,** after the EEOC has found cause in his case, and as a "neutral" interested in settlement. The Reasonable Cause decision which precedes conciliation places the weight of the government on the side of the complainant, and provides some protection against soft settlements. This process is strengthened by the theory of EEOC conciliation, which seeks to use the individual complaint as a basis for changing an entire system of industrial relations to eliminate its discriminatory character. Through this process, which is the informal administrative equivalent of a class action, the EEOC converts the individual complaint into a vehicle for a reform of industrial relations systems. Involved in the EEOC conciliation process then, is constant checking with a multitude of parties, and, at the core, the development of a set of concrete remedial proposals, which will change the industrial relations system under review as well as providing relief for charging parties. A comprehensive EEOC conciliation agreement looks and reads much like a part of a collective bargaining agreement, with extensive provisions necessary to work the change in industrial relations practices.

If this tri-partite negotiation fails, the alternative is litigation. Blumrosen, *Labor Arbitration,*

> *EEOC Conciliation and Discrimination in Employment,* Arbitration Journal, Vol. 24, 1969. [Emphasis supplied]

See also EEOC Compliance Manual, §62.5 and §64.1 (APP E, *infra*, pp. E 1-3).

In sum, the decision of the court of appeals undermines the conciliation procedures provided by Title VII, and does so in a misreliance on decisions of this Court, as was seen by the dissenting Judges on petition for rehearing.

2. We do not suggest that EEOC sponsored settlement agreements should never be vacated by the Court. We do suggest, however, that something beyond mere allegations that the complaining employee did not fully understand the agreement should be necessary to evoke a factual hearing. There should be a presumption of administrative regularity that must be overcome before a conciliation agreement, designed to end litigation, should dissolve into further litigation.

The court of appeals has failed to set any threshold beyond which a signatory must go to merit a factual hearing on the voluntariness of his agreement. Moreover, it has failed to set any substantive standards for such hearings. If subjective misunderstanding of some part of the agreement is the issue, it can hardly be disproved in light of the complexity of most conciliation agreements. If the conciliation process is to retain its central role, the scope of review must be narrower than the wide open standards set by the Fifth Circuit.

3. Finally, Petitioner would respectfully call the Court's attention to the requirement of §2000e-5(f)(1) of the Act which makes the issuance of a right to sue notice a prerequisite to the filing of a complaint against the employer once the EEOC has obtained jurisdiction over the case. Respondents White and Clark herein received no such letter since

their claim resulted in a conciliation agreement. They should be required to return to the EEOC and seek the requisite notice before bringing suit against their employer.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit frustrates the conciliation process ordained by Congress. The decision is of national importance and merits this Court's attention. The petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Victor A. Sachse, III, attorney for Allied Chemical Corporation, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15TH day of July, 1977, I served the foregoing petition for a writ of certiorari, and its appendices, on Anthony White and Henry Clark, Sr., respondents in connection with this application for a writ of certiorari, by mailing three copies thereof to their counsel of record, Donald Juneau, Esq., Post Office Box 3261, Anchorage, Alaska 99510, and on Local 216, International Union of Operating Engineers, AFL-CIO, by mailing three copies thereof to its counsel of record, James D. Thomas, II, Esq., 429 Government Street, Baton Rouge, Louisiana 70802.

VICTOR A. SACHSE III

VICTOR A. SACHSE, III

APPENDIX A

LUTTRELL B. COX, Plaintiff,

SHERWOOD COX, Plaintiff-Appellant,

ALVIN P. LOCKETT, SR., et al., Plaintiffs-Intervenors,

ANTHONY WHITE AND HENRY CLARK, SR.,

Plaintiffs-Intervenors, Appellants,

v.

ALLIED CHEMICAL CORPORATION, et al.,

Defendants-Appellees.

No. 75-2109

United States Court of Appeals,

Fifth Circuit.

Sept. 15, 1976.

Before TUTTLE, AINSWORTH and GEE, Circuit Judges.

TUTTLE, Circuit Judge:

This Title VII suit involves a plant-unit seniority system currently in effect at the Baton Rouge plant of appellee Allied Chemical Corporation, and the effect of an EEOC conciliation agreement on the right of certain appellants to sue the company and the appellee union. Following a finding that the unit seniority system used by Allied had violated the Title VII rights of two black employees who had been laid off or demoted as a result of cutbacks within their respective units, the district court granted relief in the form of back pay, but refused to reinstate these plaintiffs or to enjoin any further use of the system.

In this appeal, we consider first whether two appellants who were signatories to an EEOC conciliation agreement dealing with the use of the unit seniority system at the plant

were properly dismissed as intervenors by the district court. We also consider the argument that the district court erred in dismissing the claims of a white plaintiff on the grounds that his Title VII rights had not been affected by Allied's unit seniority system.

In its opinion,[1] the district court made lengthy findings of fact and conclusions of law, the pertinent portion of which are briefly summarized as follows. In 1966 Allied Chemical Corporation purchased the Baton Rouge Plastics Division plant from W.R. Grace and Company. At that time, and until August 1971, the plant's hourly employees were divided into four work "units:" Production, Services, Maintenance, and Stores. The racial composition of the latter two units, both at the time of the institution of the present suit and at all times prior to that, was white. At the time of the plant's purchase by Allied, the Production unit was all white and Services all black; however, as a result of a collective bargaining agreement signed in 1967, a substantial number of blacks from Services transferred to Production as "baggers." Finally, in 1971, as a result of a conciliation agreement with the Equal Employment Opportunity Commission, all of the jobs in the Services unit were merged into the Production unit and Services was abolished as a separate unit.

The 1971 EEOC conciliation agreement modified in certain respects, the company's then-existing "union seniority" system. Up until the date of the agreement (October 18, 1971) seniority for the purposes of promotion, transfer, or layoff was governed by the length of service within a particular unit. A reduction in the work force of the Services unit, for example, would take place without regard to the seniority of the Services unit employees as compared with that of employees of the other units; the employees outside Services would not be affected, regardless of whether they had less seniority than those employees to be laid off. The EEOC conciliation agreement undertook to modify the use of this unit seniority system, as it pertained to black employees who transferred between units or between job classifications within

1. The district court's opinion is reported at 382 F.Supp. 309 (M.D.La. 1974).

a unit, by providing that such transferees were to be credited with their total plant seniority for purposes of that transfer, promotion, layoff, vacations, or recall.[2] (The black employees who were formerly in Services were allowed to use their total plant seniority as their unit seniority in the Production unit.) In the absence of a transfer, however, a black employee's seniority, for layoff purposes, continued to be measured by the length of time he or she had been in that particular unit. The collective bargaining agreement executed by the appellee union and the appellee company on October 15, 1973, and which was in effect at the time this suit was instituted, contained seniority provisions parallel to those in the EEOC conciliation agreement.[3]

2. The pertinent portions of the conciliation agreement provide as follows:
"IX. AFFECTED CLASS AND SENIORITY"
"A. The Respondents agree that members of the 'Affected Class' shall be those Negro employees previously identified by the Respondent Company as making up the 'Affected Class'. This included those Negro employees working in the predominantly Negro Job Classifications of Baggers, Truck Driver, Leader, Janitor and Laborer, who were hired into these classifications on or before May 2, 1969. A list of such 'Affected Class' employees, by name, department, job, and date of initial hired, is attached hereto as Exhibit No. 1.
"B. The Respondent Company agrees that it will give priority to members of the 'Affected Class' in filling all job vacancies in accordance with Article 9, Section 7, of the current Labor Agreement. Whenever a vacancy exists, the Respondent Company will review the qualifications of 'Affected Class' members and identify those individuals qualified to fill the vacancy. The most senior qualified bidder shall be awarded the job. A qualified individual shall be defined as possessing minimal qualifications or aptitude necessary to perform the job.
"C. All members of the 'Affected Class' who transfer between units shall be creditted with **total plant seniority** for purposes of that transfer, promotion, **layoff**, vacations, or recall. (Emphasis added.)
"D. The Respondent Company and Respondent Union represent that a special seniority agreement covering all employees has been negotiated. This new 'Supplemental Agreement' provides that when employees transfer from one unit to another unit or within a unit, they will carry their total plant seniority with them into their new unit or job, as outlined in the Supplemental Agreement. A copy hereto attached and made a part of this Agreement as Exhibit 2."

3. The single major modification made by the collective bargaining agreement was the addition of the following provision:
"C. When any member of the 'Affected Class' is competing with other employees in bidding for a senior operator's job in the Production Unit, the 'Affected Class' employee will not be allowed to utilize his plant seniority until he has completed the progression as an A Operator as stipulated in Appendix I of the current agreement."
The validity of this provision is not at issue on this appeal.

This suit was originally filed by two black employees, Luttrell B. Cox and Lloyd R. Hinton, and a white employee, Sherwood Cox, all of whom alleged that the discriminatory effects of the seniority system, and in particular its application in the case of layoffs, constituted a violation of their Title VII rights. Luttrell Cox began employment at Allied as a B Operator in the Production unit in September 1967, but on or about October 22, 1971 he was demoted to the position of janitor, as a result of the above-described layoff rules, and resigned for that reason. It was stipulated that at the time of his demotion, there were employees in Maintenance and Stores with less plant seniority. Plaintiff Hinton started work at Allied on December 2, 1968 in the Production unit, and had advanced to the position of A Operator by May 1971. On or about the same date as Luttrell Cox was demoted, Hinton was laid off as a result of the company's unit seniority policy. Plaintiff Sherwood Cox began employment at Allied in the Production unit on January 20, 1966, and at the time of the institution of this suit was still employed as an A Operator in that unit.

The district court denied plaintiff's motion to maintain the suit as a class action, a ruling which had not been appealed and which we thus need not consider. The court also dismissed from the suit certain plaintiffs-intervenors whom it had previously admitted as parties, finding their causes of action barred by virtue of their status as signatories to the October 1971 EEOC conciliation agreement containing a clause waiving the charging parties' right to sue either the company or the union in return for those entities' compliance with the provisions of the agreement. On the merits, the district court found that both Luttrell Cox and Lloyd Hinton were qualified for jobs in the Maintenance unit, and that they probably would have transferred into that unit at an early date had it not been for the company's policy of maintaining racially segregated units. Thus, the court concluded, the unit seniority system had discriminated against Luttrell Cox and Hinton, violating their Title VII rights; consequently, the court awarded them both back pay, although refusing to reinstate them or to enjoin the use of the unit seniority system, which

it did not find discriminatory *per se*.[4] Finally, the court found that there was no evidence that plaintiff Sherwood Cox's Title VII rights had been violated, and dismissed his claim. Neither Luttrell Cox nor Lloyd Hinton, the successful plaintiffs, has appealed from the district court's failure to enjoin the unit seniority system as modified by the conciliation agreement. Plaintiffs-intervenors Anthony White and Henry Clark, however, have appealed both from the district court's dismissal of them from the case and from its refusal to enjoin the use of the modified unit seniority system. Sherwood Cox has appealed the district court's dismissal of his claim on the merits. We deal with these issues seriatim.

I. *The Effect of the Conciliation Agreement.*

In its order of December 12, 1973, dismissing the complaints of intervenors Henry Clark and Anthony White, the district court held that as signatories to the October 18, 1971 EEOC conciliation agreement, they were barred from intervention in this case. Part II(C) of the conciliation agreement provides as follows:

> "The Charging Parties hereby waive, release, and covenant not to sue Respondent Company and/or Respondent Union with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission, subject to performance by the Respondents of the promises and representations contained herein. The Commission shall determine whether the Respondents have complied with the terms of this Agreement."

Appellants contend below, and renew their contention here, that neither of them "understandingly and knowingly"

4. An examination of the timing involved in Cox's and Hinton's demotion and layoff, respectively, is important to an understanding of their success in bringing their suits as compared to the district court's finding that the unit seniority system, as modified by the EEOC conciliation agreement and new collective bargaining agreement, was not itself violative of Title VII. It was stipulated that both Cox and Hinton were demoted and laid off within a day or two after the EEOC conciliation agreement went into effect and the collective bargaining agreement was modified to parallel its provisions; this was scarcely enough time for either plaintiff to have transferred into the Maintenance unit, a move for which each was found to be qualified by the court.

waived his right to sue, and argue that the district court should have conducted a hearing on this voluntariness issue. In light of recent decisions by both the Supreme Court and this Court, we agree.

In *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court considered and rejected an argument that the petitioner's voluntary submission of an employment discrimination grievance to arbitration, pursuant to the terms of a collective bargaining agreement, constituted a binding waiver of his rights under Title VII. In a footnote to the statement that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement," the Court added the following caveat:

> "In his case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. *In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.*"

415 U.S. at 52 n. 15, 94 S.Ct. at 1021. (Emphasis added.) More recently, this Court found insufficient to establish a knowing, voluntary relinquishment of Title VII rights the mere signature of an employee on a waiver form referring to changes in advancement procedures agreed upon by the company and the labor union in a Memorandum of Understanding:

> "The plaintiffs' theory is that the forms were *signed* without understanding. To assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of contract law to play too salient a part in the administration of a remedial civil rights statute. *Cf. Alexander v. Gardner-Denver Co.* [citations omitted] . . . A waiver of a federal remedial remedy is not to be lightly inferred, and the issue must be looked at in the context of the racial discrimination which, for most of its existence, has characterized the mill's operation."

Watkins v. Scott Paper Co., 530 F.2d 1159, 1172-73 (5th Cir. 1975). In light of this recently-expressed deep concern over the necessity for establishing voluntariness before finding an effective waiver of a plaintiff's Title VII rights, we hold that the district court erred in dismissing the complaints in intervention of Clark and White without first holding a hearing to determine whether in fact they comprehended the rights they were relinquishing when they signed the October 1971 EEOC conciliation agreement.[5]

In view of our disposition of this issue, appellants-intervenors' argument concerning the district court's failure to enjoin the use of the modified unit seniority system is not before us at this time. The district court should consider that issue if it determines, upon remand, and conducting a hearing, that the intervenors did not knowingly and voluntarily waive their rights by signing the conciliation agreement so that it does not constitute a bar to their suit.

II. *The Dismissal of Appellant Sherwood Cox's Claim.*

Finally, we consider the contention of appellant Sherwood Cox that the district court erred in dismissing his Title VII suit. As stated before, appellant Cox is a white employee of Allied, currently serving as an A Operator in the Production unit; he has never sought transfer out of that unit and the district court found that there was insufficient evidence to show that he is in fact qualified to work in Maintenance. He has alleged only that the seniority system injures him because he is "immediately faced with a layoff in the foreseeable

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5. From the record before us, it is clear that the district court was aware of the precise nature of the intervenors' arguments concerning the voluntariness of their status as signatories to the agreement, and it is also clear from reading the affidavit of Anthony White that there was at least some evidence before the court, at the time it ruled on defendants' motion to dismiss the complaints in intervention, that the waivers were signed with less than full knowledge of the bargain that was being struck, as may be seen in White's answer to the following question about whether the lawyer advising the employees who were signatories to the agreement had explained the agreement to them:

> "Q. Did Mr. Lange explain it to you?
>
> A. Oh, yes. Well, he said—well, I figured he was doing the right thing and everything, the way—the way he was talking he thought it was for the good of us, you know. From what he said and everything, well, we went—right along with him."

future whereas members in the maintenance department are being retained . . . in their employment with up to probably half of the seniority that he has."

While it is now clear that white persons can have a cause of action for employment discrimination under Title VII, *see McDonald v. Sante Fe Trail Transportation Co.*, —— U.S. ——, 96 S.Ct. 2574, 49 L.Ed.2d —— (1976), it is nevertheless clear from the facts as found by the district court that appellant Cox has not even alleged that he was discriminated against *because of his race*, a prerequisite for a Title VII action. Hence, regardless of the merits of the modified unit seniority system still being utilized by appellee Allied Chemical, the district court did not err in dismissing his claims on the merits.

The judgment of the district court is accordingly AFFIRMED in part, REVERSED in part, and the case REMAIDED for further proceedings not inconsistent with this opinion.

APPENDIX B

LUTTRELL B. COX, Plaintiff,

SHERWOOD COX, Plaintiff-Appellant,

ALVIN P. LOCKETT, SR., et al.,
Plaintiffs-Intervenors,

ANTHONY WHITE AND HENRY CLARK, SR.,
Plaintiffs-Intervenors Appellants,

v.

ALLIED CHEMICAL CORPORATION et al.,
Defendants-Appellees.

No. 75-2109.

United States Court of Appeals,

Fifth Circuit.

April 20, 1977.

Appeal from United States District Court for the Middle District of Louisiana.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC

(Opinion Sept. 15, 1976, 5 Cir., 1976, 538 F.2d 1094).

Before TUTTLE, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, and THORNBERRY,

COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

JOHN R. BROWN, Chief Judge, with whom Hill, Circuit Judge, joins, dissenting:

I dissent to the Court's refusal to grant rehearing en banc. The panel's opinion undermines the purpose of conciliation as designed to operate in Title VII claims. Under the panel holding collateral attack may be brought on any conciliation agreement by any one or more of the parties on the basis that they did not understand the agreement when they signed it. The end result of this will be a great burden on any employer entering into such an agreement.

Why should employers enter a conciliation agreement if as to any one or more of all the thousands of employees in a large industrial plant they would have to bear the burden of proving that each employee understood what he was doing when he signed the conciliation agreement which had been negotiated and adopted under the close supervision of EEOC? By its decision the Court is injecting new ideas in the process of conciliation which will make conciliation agreements very difficult if not impossible to achieve. As I view the decision it will make employers, unions and employees very leary of the entire conciliation process to which all have expressly agreed.

The two case authorities cited by the panel are not dispositive of Title VII conciliation questions. *Watkins v. Scott Paper Co.*, 5 Cir., 1975, 530 F.2d 1159, was an attempt by the Department of Labor's Office of Federal Contract Compliance to bring Scott Paper Company within the requirements of an Executive Order. To this end a memorandum of understanding was signed by the employer and the labor union. The employees signed a statement that they understood the memorandum. The only advisors there to explain the memorandum to them before signing were two other employees, one a representative of the union and one a management representative. The conciliation agreements under Title VII are inapposite. The EEOC closely supervised such agree-

ments. Any employee not a party to a conciliation agreement under Title VII may bring suit. But the Executive Order in *Watkins* did not provide for conciliation prior to filing suit. The conciliation agreement provided for in Title VII is a special, statutory contract. The agreement in *Watkins* had no statutory basis.

The panel also cites *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) as authority for their holding. In my view the proper interpretation of this opinion is that given by Judge Thornberry in *U. S. v. Allegheny-Ludlum Industries*, 5 Cir., 1975, 517 F.2d 826, in which he said,

> "*Gardner-Denver* holds only that 'an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.' . . . Arbitration is a *collective* right; a Title VII cause of action is a *personal* right. When the employee submits a grievance to arbitration, he or she is pursuing a contract right which flows from the collective bargaining agreement. The rights asserted in a Title VII suit flow, by contrast, from an act of Congress independent of the traditional labor-management bargaining process." (Cites omitted).

In the present case the EEOC did effect conciliation. Here the matter should end.

For these reasons I would grant rehearing en banc.

APPENDIX C

LUTTRELL B. COX et al.,

v.

ALLIED CHEMICAL CORPORATION, LOCAL 216, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Civ. A. No. 72-106.

United States District Court, M. D. Louisiana.

Sept. 23, 1974.

E. GORDON WEST, District Judge:

This suit is brought by two former employees and one present employee of the defendant, Allied Chemical Corporation, alleging violations of the Civil Rights allegedly protected by the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The plaintiffs purportedly bring this action in their own behalf and as a class action on behalf of all other persons similarly situated pursuant to Rule 23(a), (b)(2) and (3) of the Federal Rules of Civil Procedure. The plaintiffs, in essence, challenge the seniority system employed at the Allied Chemical plant, and seek damages and other appropriate relief for what they claim to be discriminatory transfer, promotion, and layoff practices employed by Allied and the union to which plaintiffs belong, Local 216, International Union of Operating Engineers, AFL-CIO.

The defendants contest the plaintiffs' right to maintain this suit as a class action, and also deny that they or either of them have or are engaging in any hiring, firing, transfer or promotion practices that are in any way discriminatory or contrary to law. After a full evidentiary hearing, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The defendant, Allied Chemical Corporation, is an employee in an industry affecting commerce, and the defendant, Local 216, International Union of Operating Engineers, AFL-CIO (hereinafter "Local 216") is a labor organization and the bargaining agent for the hourly employees at Allied's Plastics Division plant in Baton Rouge, Louisiana.

On January 17, 1966, Allied Chemical Corporation purchased the Baton Rouge Plastics Division plant from W. R. Grace & Company. At that time, and until August, 1971, the hourly employees at the plant were divided into four "units": 1) Production, 2) Services, 3) Maintenance and 4) Stores. The racial composition of the Maintenance and Stores Units is presently and always has been white. That of the Services and Production Units is somewhat more complicated. It appears that when Allied Chemical Corporation purchased the plant in 1966 the Production Unit was all white and the Services Unit was all black. As a result of the collective bargaining agreement of December 15, 1967 between Allied and Local 216, a substantial number of blacks from the Services Unit transferred to the Production Unit as baggers. In 1971, as a result of a conciliation agreement with the Equal Employment Opportunity Commission, all of the jobs in the Services Unit were merged into the Production Unit, and the Services Unit was abolished. After the merger of these units the black employees who were formerly in the Services Unit were able to use their total plant seniority as their unit seniority in the Production Unit. In addition, the EEOC conciliation agreement and the present collective bargaining agreement provide that when a black employee hired on or before May 2, 1969 transfers from one seniority unit to another or within a seniority unit, he will compete with other employees on the basis of his total plant seniority, providing he has successfully completed a one-year residency requirement. At the present time, although the Production Unit is integrated, all of the Senior Operator and A Operator jobs are filled by whites, and all black employees of Allied work in the unit as baggers, truck drivers, janitors, and laborers. In the past there have been two black A Operators and one black trainee, who voluntarily returned to the B Operator (bagger) classification.

The Production and Maintenance Units at the plant subdivided into different job classifications. The jobs in the Production Unit are Senior Operator, A Operator, B Operator (bagger), C Operator (truck driver), D Operator (janitor), and E Operator (laborer). The jobs in the Maintenance Unit are Senior Mechanic and Mechanic, which are both maintenance related craft jobs. The employees in the Production Department classified as Senior Operator and A Operator are paid salaries comparable to the Senior Mechanics and General Mechanics in the Maintenance Department. The other employees in the lower classifications of the Production Unit have no counterparts in the Maintenance Unit. The Stores Unit has the single job classification of Storeroom Clerk. The Storeroom Clerk receives a salary in an amount slightly less than that of a starting A Operator.

Under the terms of the present and all prior collective bargaining agreements between defendants, there is now and has been in effect at the Baton Rouge Plastics Division plant a "unit seniority" system. Therefore, seniority for the purposes of promotion, transfer, or lay-off is governed by the length of service within a particular unit. The plaintiffs contend that the discriminatory effects of this seniority system, and in particular its application in the case of lay-offs, is a violation of Title VII of the Civil Rights Act. Under the collective bargaining agreement, when a reduction in force in a particular unit is necessary, the employees in the jobs to be eliminated are allowed to displace the least senior employees within their job classification. The employees who are displaced from their job classification are in turn permitted to displace the least senior employees in the next lower classification. This procedure is followed until the least senior employees in the unit are laid off. The reduction in force in one unit takes place without regard to the seniority of the employees of the other units. So, the employees outside the unit suffering a reduction in force are not affected by the reduction in the other unit, regardless of whether they have less seniority than those employees to be laid off.

The defendants contend that the separation of units by a unit seniority system is justified because of the functional

difference in the departments and by the fact that the plant could not operate in a safe and efficient manner unless qualified maintenance personnel are allowed to hold positions in the Maintenance Unit. The evidence clearly establishes that work in the Maintenance Unit requires a certain amount of technical knowledge of highly complex machinery by employees with a mechanical aptitude in order to safely and efficiently perform the job as a mechanic and at the same time maintain a profitable on stream factor for the company. The testimony of Al Farris, Maintenance Supervisor, and Don Rosenberg, Plant Manager, establishes that the plant utilizes potentially dangerous chemicals, under conditions of heat, high temperature, and pressure to produce its product. In addition, the machinery is complex and must be properly maintained and repaired to meet a very close operational tolerance on the order of .001-.003 inches, and must be adjusted by the use of precision tools and instruments.

It is the Company's position that to achieve the necessary level of safety and proficiency, it would like to require that a prospective employee of the Maintenance Unit have at least three years industrial maintenance experience. However, the defendants have stipulated that several employees, although not a significant number of the force, entered the Maintenance Unit at a time (from late 1965 through 1968) when there was a tight labor market condition in Baton Rouge and personnel with sufficient industrial and educational experience were not available to fill maintenance positions. Maintenance employees hired during this period learned the requisite skills by working on the job with experienced mechanics.

On September 11, 1967, the plaintiff, Luttrell B. Cox, a negro, was employed by Allied Chemical Corporation as a B Operator in the Production Unit. On or about October 22, 1971, he was demoted to the position of janitor, as a result of the above described lay-off rules, and for that reason he resigned. The parties have stipulated that at the time Luttrell Cox was demoted, there were employees in the Maintenance and Stores Unit with less plant seniority. In addition, evidence supports the conclusion that he had acquired some maintenance related education and skills while serving in the Army.

Plaintiff, Lloyd R. Hinton, a negro, was employed by Allied in the Production Unit on December 2, 1968. According to the "Minority Employees" list contained in Joint Exhibit 4, Hinton was working as an A Operator on May 25, 1971. On October 22, 1971, he was laid off as a result of the above described lay-off rules. It is also stipulated that when Hinton was laid off there were employees with less plant seniority in the Maintenance and Stores Unit. Furthermore, the evidence clarly establishes that he had acquired maintenance related training and skills while in the Army.

Plaintiff, Sherwood Cox, white, has been employed by Allied in the Production Unit since January 20, 1966. He is presently employed as an A Operator in that Unit.

CONCLUSIONS OF LAW

This Court has jurisdiction over the claims of the three individual plaintiffs as claims arising under the Civil Rights Act of 1866, 42 U.S.C. § 1981, Sabala v. Western Gillette, Inc., 362 F.Supp. 1142 (S.D.Tex.1973). See also Caldwell vs. National Brewing Co., 443 F.2d 1044 (CA 5-1971); Sanders v. Dobbs Houses Inc., 431 F.2d 1097 (CA 5-1970), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The defendants contend that plaintiffs have not met the jurisdictional requirements of Title VII in that "right to sue" letters had not been issued by the Equal Employment Opportunity Commission. The plaintiffs, on the other hand, point out that more than six months prior to instituting this action they filed a complaint with EEOC charging defendants with racial discrimination in violation of Title VII. However, the Commission was unable to satisfactorily dispose of the plaintiffs' complaint, and, although specifically requested by counsel, failed to issue plaintiffs a "right to sue" letter, apparently because it had misplaced the charges which plaintiffs had filed. It is clearly established by the cases which have interpreted 42 U.S.C. §2000e-5 that there are only two jurisdictional requirements for suit under Title VII: 1) The filing of a complaint with EEOC, and 2) the receipt of the statutory notice of right to sue. See Beverly v. Lone Star Lead Const. Corp., 437 F.2d 1136 (CA 5-1971); Miller v. International Paper Co., 408 F.2d 283 (CA 5-1969); Dent v. St.

Louis-San Francisco Ry. Co., 406 F.2d 399 (CA 5-1969). There is no question of plaintiffs' compliance with the first of these requirements. As to the second, this Court has previously held, while considering defendants' motion to dismiss, that under the circumstances of this case, EEOC could not prevent judicial determination of plaintiffs' complaint by refusing to give the required statutory notice of a right to sue. The basic purpose for imposing the duty upon an employee of seeking conciliation through the EEOC is "that voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action." Dent v. St. Louis-San Francisco Ry. Co., supra, at 402. In the present case plaintiffs have done all that the statute requires in seeking conciliation of their claims. They should not be further barred from bringing suit because of actions by the EEOC which were beyond their control. "To bar a party from bringing a suit because the E.E.O.C. has shirked its statutory responsibility would indeed be to provide a hollow remedy and to inflict an undeserved penalty upon an innocent person." Mondy v. Crown Zellerbach Corp., 271 F.Supp. 258 at p. 263.

The plaintiffs seek to have this suit maintained as a class action on behalf of a class of present and former employees in the Production Unit at the plant, pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure. That rule provides:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."
>
> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *."

The plaintiffs contend that since the class is allegedly composed of all present and past employees of the Production Unit, both black and white, the class is so numerous that joinder of all members is impracticable, and that thus the requirement of Rule 23(a)(1) is met. However, this conclusion is not supported by the law or the evidence.

As to the white employees in the Production Unit, it seems clear that they can be members of a class in a Title VII suit if they can first show that they were adversely affected by the employer's or union's racially discriminatory practices. In United States v. Roadway Express, Inc., 457 F.2d 854 (CA 6-1972), the Court at page 856 stated:

"In seeking to deny such seniority to the transferred white city drivers, the appellants overlook the corollary fact that the white city drivers were equally the victims of discrimination, since their transfer was prevented as a necessary part of the refusal to permit black city drivers to transfer to over-the-road jobs."

But, in the present case, there is no evidence showing that any or all of the white members of the Production Unit were adversely affected as a result of racial discrimination against blacks at the Allied plant. For example, the "Seniority List" of January 21, 1974 (Joint Exhibit 5) shows that of a total of 85 whites in the Production Unit, 76 work in Senior Operator of A Operator job classifications. These employees are paid a salary which is the same as that paid to the mechanics and senior mechanics in the Maintenance Unit. There is no indication that the other white employees are in the lower job classification for any reason other than the fact that they have not been employed long enough to accumulate seniority or they are not qualified to handle another job.

In addition, there is no evidence that any of the white employees of the Production Unit ever desired to transfer

out of the Production Unit into another unit and were deprived of doing so because of discriminatory practices. In fact, Sherwood Cox, the white plaintiff who is allegedly the representative of these employees, did not even take the stand and there is nothing to indicate that he was qualified to handle maintenance related work. Therefore, the plaintiffs have failed to bear their burden of proving that any of the white employees of the production unit were adversely affected by racial discrimination on the part of Allied or the union and thus are members of the class.

It seems equally clear that those black employees who were signatories to the October 18, 1971 EEOC conciliation agreement cannot be considered as members of the class in the present case. This Court has already determined that a signatory of the EEOC agreement could not intervene as a party to this suit since EEOC has retained jurisdiction to supervise the carrying out of that agreement. Part II(f) of the conciliation agreement provides:

"The Charging Parties hereby waive, release, and covenant not to sue Respondent Company and/or Respondent Union with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission, subject to performance by the Respondents of the promises and representations contained herein. The Commission shall determine whether the Respondents have complied with the terms of this Agreement."

In its minute entry of December 12, 1973, dismissing the complaints of intervenors Henry Clark, Jr. and Anthony White, this Court stated:

"The gist of the intervenors' position is that they entered into the EEOC agreement without proper legal advice and that they were not advised at the time of available alternate procedures. We do not believe that this is sufficient grounds for the intervenors to ignore the EEOC agreement and attempt to pursue this litigation. If they have these complaints, they may present them to the EEOC which has retained jurisdiction over the operation

of the conciliation agreement, and they may, of course, receive relief from the EEOC if their claims are justified. The very purpose of the conciliation agreement was to avoid litigation insofar as all parties thereto were concerned. To permit these intervenors to come into this suit would be to ignore completely the conciliation agreement and would be to disregard completely the attempts of the EEOC to settle these matters without the necessity of litigation, which was the very purpose of the establishment of the EEOC in the first place."

Since these individuals cannot join as parties it follows that they should not be the basis for a class action. To hold otherwise would have the effect of undermining the EEOC settlement. This is not to say that the signing parties could not be the beneficiaries of any class action which is properly brought. But to allow them to be the sole foundation of such an action would be completely unjustified.

At the time the conciliation agreement was entered into there were a total of 42 minority employees working in the Production Unit. Since 36 of these individuals were signing parties to that conciliation agreement, this leaves a remainder of only six employees to be considered as members of plaintiffs' class. Although plaintiffs contend the class consists of former as well as present employees of the Production Unit, it has not introduced a single shred of evidence to show that former employees, other than those laid off since the conciliation agreement, have been adversely affected by discriminatory practices. Therefore, with a possible class of only six individuals, the plaintiffs have failed to meet their burden of proving the class is so numerous that joinder would be impracticable as required by Rule 23(a)(1).

The principal claim asserted by the plaintiffs in this case concerns whether the unit seniority system set out in the collective bargaining agreement between Allied Chemical Corporation and Local 216 and the "layoff" provisions contained therein violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., 42 U.S.C. § 2000e-2(a) provides:

"It shall be unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Similar prohibitions with respect to labor unions are set out in 42 U.S.C. § 2000e-2(c).

The plaintiffs in this case do not contend that defendants are actively discriminating against black employees of Allied Chemical at the present time, but rather that the effects of past discrimination were carried forward and were still in existence at the time of their layoff because of the seniority and layoff provisions contained in the collective bargaining agreement. Therefore, it is the present discriminatory effects of the prior racial exclusion of negroes from certain job units that the plaintiffs contend is the violation of Title VII. In support of this contention, plaintiffs rely on a long line of recent cases which hold that where a seniority system carries forward and perpetuates the effects of past discrimination into the present, such a system is a continuing violation of Title VII unless it is justified by a legitimate, non-discriminatory business necessity.

The Fifth Circuit case which first considered this problem was Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (CA 5-1969). In that case the Court found the facts to be as follows. Prior to 1964 the Company, Crown Zellerbach at Bogalusa, Louisiana, divided jobs into two seniority lines, a black line and a white line, with the job benefits in the black line being much less desirable than those in the white line. In 1964 the lines were merged. However, because of the lower pay scale in the black line, it was in effect merely tacked to the bottom of the white line.

Promotions were determined by the amount of job seniority in the position below the vacant job.

The Court held that Crown Zellerbach's job seniority system which was in effect at its Bogalusa Paper Mill violated Title VII "because by carrying forward the effects of former discrimination practices the system results in present and future discrimination. When a negro applicant has the qualifications to handle a particular job, the act requires that negro seniority be equated with white seniority." The Court pointed out that:

> "It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race." 416 F.2d at 988.

After it determined that there still remained present effects of past discrimination, the problem then before the Court was how far must an employer go to remedy the discriminatory effect. The Court considered three possible theories for handling the problem:

> "The crux of the problem is how far the employer must go to undo the effects of past discrimination. A complete purge of the 'but-for' effects of previous bias would require that Negroes displace white incumbents who hold jobs that, but for discrimination, the Negroes' greater mill seniority would entitle them to hold. Under this '*freedom now*' theory, allowing junior whites to continue in their jobs constitutes an act of discrimination.
>
> "Crown and Local 189 advance a 'status quo' theory: the employer may satisfy the requirements of the Act merely by ending explicit racial discrimination. Under that theory, whatever unfortunate effects there might be in future bidding by Negroes luckless enough to have been hired before desegregation would be considered merely as an incident of now extinguished discrimination.
>
> "A '*rightful place*' theory stands between a complete

> purge of 'but-for' effects [and] maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation."

After adopting the "rightful place" theory the Court then recognized that there are certain times as a matter of practicality and "business necessity" when it cannot be applied.

> "Not all 'but-for' consequences of pre-Act racial classification warrant relief under Title VII. For example, unquestionably Negroes, as a class, educated at all-Negro schools in certain communities have been denied skills available to their white contemporaries. That fact would not, however, prevent employers from requiring that applicants for secretarial positions know how to type, even though this requirement might prevent Negroes from becoming secretaries." At p. 988.

And,

> "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose. Secretaries must be able to type. There is no way around that necessity." At p. 989.

Therefore, it is clear from this case that a District Court has the power to eliminate the present effects of past discrimination by altering a seniority system which is apparently racially neutral on its face, unless the doctrine of business necessity is applicable. The present effects of past discrimination interpretation of Title VII has since been reaffirmed and applied many times. See Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364 (CA 5-1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (CA 5-1973); United States v. Georgia Power Company, 474 F.2d 906 (CA

5-1973); United States v. Hayes International Corporation, 456 F.2d 112 (CA 5-1972); Bing v. Roadway Express, Inc., 444 F.2d 687 (CA 5-1971); Robinson v. Lorillard Corporation, 444 F.2d 791 (CA 4-1971); Watkins v. United Steel Workers of America, Loc. No. 2369, 369 F.Supp. 1221 (E.D.La.-1974). See also Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va.-1968).

None of the Title VII cases have ever held that the unit or departmental seniority system is per se a violation of the Civil Rights Act. In fact, in every case where it was questioned the courts have allowed the company to maintain separate departments, with their separate seniority systems, when the jobs or functions to be performed are not directly related to each other. The courts simply applied the rightful place formula to the existing departments. This is primarily what the EEOC conciliation agreement did in the instant case. Although there was a merger of the Services and Production Units, the other two units maintain their separate identity. The agreement requires something very similar to the "rightful place" formula in favor of negroes seeking transfers and advancements. Section IX of the agreement states:

"IX. AFFECTED CLASS AND SENIORITY"

"A. The Respondents agree that members of the 'Affected Class' shall be those Negro employees previously identified by the Respondent Company as making up the 'Affected Class'. This included those Negro employees working in the predominantly Negro Job Classifications of Baggers, Truck Driver, Leader, Janitor and Laborer, who were hired into these classifications on or before May 2, 1969. A list of such 'Affected class' employees, by name, department, job, and date of initial hired, is attached hereto as Exhibit No. 1.

"B. The Respondent Company agrees that it will give priority to members of the 'Affected Class' in filling all job vacancies in accordance with Article 9, Section 7, of the current Labor Agreement. Whenever a vacancy exists, the Respondent Company will review the qualifications of 'Affected Class' members and identify

those individuals qualified to fill the vacancy. The most senior qualified bidder shall be awarded the job. A qualified individual shall be defined as possessing minimal qualifications or aptitude necessary to perform the job.

"C. All members of the 'Affected Class' who transfer between units shall be credited with *total plant seniority* for purposes of that transfer, promotion, *layoff*, vacations, or recall. (Emphasis added.)

"D. The Respondent Company and Respondent Union represent that a special seniority agreement covering all employees has been negotiated. This new 'Supplemental Agreement' provides that when employees transfer from one unit to another unit or within a unit, they will carry their total plant seniority with them into their new unit or job, as outlined in the Supplemental Agreement. A copy hereto attached and made a part of this Agreement as Exhibit 2."

This preference to "Affected Class" employees in transfers and promotions is also supported by a special provision in the current October 15, 1973, collective bargaining agreement. The "Special Provisions" section of this agreement states:

"SPECIAL PROVISIONS"

"A. The 'Affected Class' is hereby defined as all Negro employees who were hired on or before May 2, 1969.

"B. In any job opening which results in a transfer from one seniority unit to another or within a seniority unit, when one or more of the competing employees is a member of the 'Affected Class' the members of the 'Affected Class' will compete with other employees on the basis of his plant seniority, providing that he has successfully completed the one-year residency provision.

"C. When any member of the 'Affected Class' is competing with other employees in bidding for a senior operator's

> job in the Production Unit, the 'Affected Class' employee will not be allowed to utilize his plant seniority until he has completed the progression as an A Operator as stipulated in Appendix I of the current agreement."

It seems quite clear that the formulas set out in these provisions of the agreement are in complete compliance with Title VII as they relate to promotions and transfers.

However, the question of whether or not the layoff provisions in the pre or post October, 1971 collective bargaining agreements are in violation of the Act is another matter. While there is a dearth of cases dealing with this problem, the case of Watkins v. United Steel Workers of America, Loc. No. 2369, 369 F.Supp. 1221 (E.D.La.—1974) did address itself to lay-offs and seniority systems. In *Watkins* the plaintiffs and plaintiff intervenor were all former employees who had been laid off under the lay-off and recall procedures utilized by the defendant union and company. The evidence in that case showed that although the defendant company's plant had been in operation for "many years," it had only hired whites up until 1965, with the exception of two negroes who were hired during World War II. After 1965 the company began hiring blacks to the extent that by 1971 there were over 50 blacks in a total work force of 400. Beginning in 1971 there was a substantial cutback in personnel. Pursuant to the terms of the collective bargaining agreement in effect between the defendants, layoffs were made on the basis of "total employment seniority," with the last man to be hired being the first to be laid off. As a result of the application of these contract provisions, all of the black employees hired after 1965 had been laid off and the work force was again composed solely of white employees. In addition, the first 138 persons on the recall list were white.

The Court in *Watkins* granted the plaintiffs' and plaintiff-intervenor's motion for Partial Summary Judgment and held that under the facts of that case "the defendants' layoff and recall practices discriminate on grounds of race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, and in violation of Section 1 of the Civil

Rights Act of 1866, 42 U.S.C. § 1981." The Court set out the primary issue in the case as follows:

> "Essentially, it is movants' argument that it was racially discriminatory to use length of service as a standard for determining which employees should be laid off because blacks were prevented, by the Company's white-only hiring policy, from acquiring long years of service. (Footnote omitted.) Movants ask that the defendants be required to select employees for layoff on a basis that does not incorporate and perpetuate the effects of the Company's racial discrimination in hiring." 369 F.Supp. 1221 at 1224.

In agreeing with the moving parties' argument, the Court in its reasoning points out that it "draws strong support from two lines of related cases." These series of cases are: 1) those dealing with transfers or promotions on the basis of departmental seniority in those plants that had previously segregated work forces, like in Local 189 v. United States, supra, and 2) those cases concerning work referral rules in previously all-white craft unions. The Court stated that these two lines of cases show a single principle:

> "[E]mployment preferences cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority. And this principle applies to invalidate the layoff and recall rules in the case at bar. The Company's history of racial discrimination in hiring makes it impossible now for blacks (other than the original two) to have sufficient seniority to withstand layoff. In this situation, the selection of employees for layoff on the basis of seniority unlawfully perpetuates the effects of past discrimination." (Emphasis added.) 369 F.Supp. 1221 at 1226.

Although this appears to be a proper interpretation of those cases, it is doubtful that the Court in *Watkins* properly applied those principles to the facts of that case. The Court did not require a showing that the individual blacks were prevented from acquiring the necessary seniority "by virtue

of" prior discrimination, but instead imposed an absolute quota system on the plant. At page 1231 the Court states:

> "Similarly, in this case, the relief ordered by the Court will not be designed to compensate the blacks who were not hired by the Company between 1945 and 1965. It will be designed to insure that, because the Company hired no blacks for twenty years, the plant will not operate without black employees for the next decade. The beneficiaries of the order will be the blacks who will now work at the Harvey plant, but would otherwise have been excluded because of the structure built upon the prior discrimination."

Although the Court cited several cases, including United States v. Lathers, Local 46, 471 F.2d 408 (CA 2—1973), which appear to support this sort of quota system for the purpose of enjoining the continued effects of past discrimination, such a remedy flies into the teeth of 42 U.S.C. § 2000e-2(j) and the "rightful place" doctrine. 42 U.S.C. § 2000e-2(j) provides, in pertinent part, that:

> "Nothing contained in this subchapter shall be interpreted to require any employer * * * labor organization * * * to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer * * * admitted to membership or classified by any labor organization * * * in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 2000e-2(j) clearly shows that the Civil Rights Act was not designed to require an employer to remedy prior racial discrimination by granting "preferential treatment" in the form of a quota system to those minority individuals who have not themselves suffered the effects of discrimination.

In addition, under the "rightful place" theory, blacks are assured of "the first opportunity to move into the next vacancies in positions which they would have occupied *but for wrongful discrimination* and which they are qualified to fill." (Emphasis added.) United States v. Georgia Power Company, 474 F.2d 906 (CA 5—1973). The doctrine requires some sort of "but for" casual relationship between the discriminatory effects and the particular individual or class of individuals. For example, in Bing v. Roadway Express, Inc., 485 F.2d 441 (CA 5—1973), the Court stated that the "rightful place" theory should be applied in the following manner:

> "A complete decree must give enough relief to insure that the transferred discriminatees are able to *maintain* their rightful place. Thus the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement *he would have enjoyed*, and to give him the protection against layoffs *he would have had*, in the absence of discrimination. How much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." (Emphasis added.)

In this case the plaintiffs' claim, boiled down, is that because division of the plant into separate unit seniority lines had the effect of continuing prior exclusion of blacks from obtaining jobs in the Maintenance and Stores Units, they were locked into the Production Unit. Therefore, when Lloyd Hinton was laid off and Luttrell Cox's job was reduced, because of a cutback in the Production Unit, they should have been allowed to use their total plant seniority to protect them from layoff or reduction as long as there were white employees in the Maintenance and Stores Units with less plant seniority.

There is some merit to plaintiffs' argument. As was stated in Johnson v. Goodyear Tire & Rubber Co., supra:

> "Once it has been determined that blacks have been discriminatorily assigned to a particular department within a plant, departmental seniority cannot be utilized to freeze those black employees into a discriminatory caste."

It would seem equally logical to conclude that once a black has been discriminatorily assigned to a particular unit and has been locked into that unit because of a unit seniority system that prevents transfer, unit seniority should not be utilized to lay him off prior to an employee in another unit with less total plant seniority. This, of course, is only true if the individual being discriminated against was qualified to perform the jobs in the all-white units. Also this principle should only apply if the minority employee would have transferred but was prevented from doing so because of a system that continued the effects of past discrimination. Therefore, it must be shown that the qualified black employee would have transferred into a vacant position "but for" a racially discriminatory system. In other words, the discrimination must be the cause of plaintiffs' injury.

In this case Luttrell Cox and Lloyd Hinton were substantially inhibited from transfer into the all-white units by the collective bargaining agreements in effect at the Allied Plastic Division plant prior to October of 1971. The October, 1970 collective bargaining agreement (Joint Exhibit 2) provides that:

> "At such time as a transfer or promotion from one seniority unit to another results in a change of an employee's regular job classification, he shall accumulate seniority in his new Unit, retroactive to the date of the transfer or promotion, and his seniority in his former Unit shall be forfeited."

(A similar provision is contained in the December 15, 1967 collective bargaining agreement.) Although it has not been proved that such a result was actively desired by the defendants, in effect, the racial exclusion of blacks from the Maintenance and Stores Units was perpetuated by the above transfer clause. Therefore, prior to 1971, this provision had the effect of perpetuating past racial discrimination. With this established, the only remaining question for this Court to determine is whether these plaintiffs would have transferred into the numerous vacancies which became available in the Maintenance Unit during their employment at Allied and, if so, did they have sufficient qualifications to fill them. If this

is established, under the principles as set out above, their unit seniority should not have been used to lay them off prior to employees in the other units with less total plant seniority.

The evidence in this case shows that in all probability these parties would have transferred into the Maintenance Unit but were prevented from doing so because of the seniority system in effect at the Allied Plastics Division plant. The testimony of Lloyd Hinton shows that prior to his employment at Allied his interest and training were in basically maintenance related fields. While in the United States Army, he attended United States Army Air Conditioning and Maintenance Missile School, Air Defense Missile Repairman School, Maintenance Management and Supply Operator School, and Aviation Air Conditioning School. In addition to this training, while in the Army, he operated and maintained Diesel power generators. After being discharged from the Army he worked as an air conditioning and refrigerator mechanic at H & H Refrigeration. Presently he is a licensed television repairman and owns and operates his own repair shop in the City of Baton Rouge. From this it must be concluded that, had he had the opportunity, Lloyd Hinton would have transferred into the Maintenance Unit and that he was qualified to do so.

The same conclusion must be drawn in the case of Luttrell B. Cox. While in the United States Army he completed a course in Diesel Mechanics and Heavy Equipment. Thereafter he worked in the Army as a mechanic for three years. These qualifications appear to be comparable to those of a substantial number of employees hired into the Maintenance Unit during his employment with Allied Chemical.

It is therefore the opinion of the Court that these two plaintiffs are entitled to the appropriate relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

As to Sherwood Cox, a white employee presently working in the Production Unit, there is no evidence that he has been adversely affected by any racial discrimination. Although he did not take the witness stand, in his deposition taken on April 24, 1972 (Defendants' Exhibit 1), Mr. Cox testified that he was employed at the Allied plant as an A Operator,

which is one of the better jobs in the Production Unit. He did not testify as to any injury that he has sustained by the seniority system in effect. He does not in any way indicate that he wants to work in the Maintenance Unit. He merely states that the seniority system injures him because he is "imminently faced with a layoff in the foreseeable future whereas members in the maintenance department are being retained * * * in their employment with up to probably half of the seniority that he has." However, as pointed out above, the unit seniority system, and its necessary effects, are not per se wrong. In addition, there is no indication that Sherwood Cox was qualified to work in the Maintenance Unit. Although he stated that he had done some general automobile mechanic work and repairing of washing machines, this is not supported by his record of employment contained in Joint Exhibit 15a or by any other evidence. Furthermore, in his deposition, he stated that he did not feel that he was qualified at the present time to fill a position in the Maintenance Unit as a Machinist, an Instrument Technician, an Electrician, or a Welder. For these reasons, Sherwood Cox is not entitled to the relief he seeks under Title VII of th Civil Rights Act.

As for remedies, this Court, under 42 U.S.C. § 2000e-5(g), is authorized to:

> "* * * order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * * "

Although reinstatement is authorized, this Court would be reluctant to grant such relief if it required the removal of incumbent employees. In addition, the evidence concerning the two prevailing plaintiffs' actual losses in back pay is somewhat sketchy. Plaintiffs have suggested that should they prevail, the parties should be directed to confer as to the possibility of agreeing on appropriate relief to be granted, and failing to agree, the Court should hear further evidence

on that issue. The Court agrees with that suggestion and will so order.

Both Allied Chemical Company and Local 216 should be equally liable for any back pay entitlements. Under the facts of this case "it would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party." Johnson v. Goodyear Tire & Rubber Co., supra.

In addition, pursuant to 42 U.S.C. § 2000e-5(k), the "court, in its discretion, may allow the prevailing party, * * * a reasonable attorney's fee as part of the costs," which in this case should be allowed in favor of the attorney for Luttrell Cox and Lloyd Hinton. In the event the parties cannot agree on this item of costs, the Court will hear further evidence on that issue also.

Judgment will be entered in accordance herewith.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
MINUTE ENTRY:
DECEMBER 12, 1973
WEST, J.

LUTTRELL B. COX, ET AL
Plaintiffs

ALVIN P. LOCKETT, SR., ET AL
Plaintiffs-Intervenors

Versus

ALLIED CHEMICAL CORPORATION, ET AL
Defendants

* * * * *

This matter was submitted to the Court on the motion of the defendant, Allied Chemical Corporation, and the defendant, Local 216, International Union of Operating Engineers, AFL-CIO, to dismiss the complaint of intervention filed on May 21, 1973. Since this matter was submitted, counsel for all parties have entered into a consent decree dated and filed in the record on December 7, 1973, which dismissed the complaint of intervenors as it pertained to all but two intervenors, namely, Henry Clark, Sr. and Anthony White. Consequently, the matter now before the Court pertains only to the defendants' motion to dismiss the intervention as to these two intervenors. The record in this case shows that on October 18, 1971, several employees of Allied Chemical Corporation, including these two intervenors, entered into a conciliation agreement with the Equal Employment Opportunity Commission (EEOC) and that the EEOC retained jurisdiction over the matter to supervise the carrying out of the conciliation agreement. The defendants' motion to dismiss these two remaining intervenors is based upon the fact that

they are bound by the terms of the conciliation agreement, which agreement, defendants contend, covers all of the points involved in the present litigation. Defendants further contend that if they are not satisfied that the conciliation agreement is being complied with, that they must present their claim to the EEOC. The gist of the intervenors' position is that they entered into the EEOC agreement without proper legal advice and that they were not advised at the time of available alternate procedures. We do not believe that this is sufficient grounds for the intervenors to ignore the EEOC agreement and attempt to pursue this litigation. If they have these complaints, they may present them to the EEOC which has retained jurisdiction over the operation of the conciliation agreement, and they may, of course, receive relief from the EEOC if their claims are justified. The very purpose of the conciliation agreement was to avoid litigation insofar as all parties thereto were concerned. To permit these intervenors to come into this suit would be to ignore completely the conciliation agreement and would be to disregard completely the attempts of the EEOC to settle these matters without the necessity of litigation, which was the very purpose of the establishment of the EEOC in the first place. Therefore:

IT IS ORDERED that the defendants' motion to dismiss the complaint of intervention as to intervenors Henry Clark, Sr. and Anthony White be, and it is hereby GRANTED, reserving all rights to all parties connected with the principal demand in this suit.

(SIGNED) E. GORDON WEST
United States District Judge

APPENDIX E

PERTINENT STATUTORY AND REGULATORY PROVISIONS

1. The Conciliation Process

The power of the Equal Employment Opportunity Commission to conciliate disputes under the Civil Rights Act is contained in Sec. 706(b), 42 U.S.C. §2000e-5(b):

> ". . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . ."

With respect to conciliation, the EEOC's regulations provide:

"PROCEDURE TO RECTIFY UNLAWFUL EMPLOYMENT PRACTICES

§1601.22 Conciliation, settlements.

In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful employment practice and take appropriate affirmative action. Disposition of a case pursuant to this section shall be in writing, and notice thereof shall be sent to the parties. Proof of compliance with title VII will be obtained by the Commission before the case is closed." 29 C.F.R. §1601.22

Reference is also made to the Compliance Procedures Manual of the Equal Employment Opportunity Commission:

"62.5 **Conducting Conference with the Charging Party**

(a) **Reasons for Meeting with Charging Party First** - The conciliator should meet with the CP first to learn whether anything has happened since the investigation which would affect original objectives (e.g., CP's em-

ployment history and interest in hire/re-hire, loss of earnings computation); to determine if conciliation objectives have CP's approval; and to obtain other information from CP which will enable the conciliator to present the best statement of CP's claim. The conciliator should determine what relief CP is seeking; and discuss with CP the approach planned for conciliation. If, a particular request of CP is unrealistic CP should be advised that the request will be presented to R, but the chances of its acceptance are questionable.

(b) **Information to Be Furnished CP** - The CP will be specifically advised that the Commission will seek the kind of remedy that a Federal court would provide were the CP to prevail in litigation, in order to justify CP's waiver of right-to-sue. Conciliator should explain that the Commission may not be able to resolve all problems in the case after discussions with R, and advise CP that if conciliation efforts fail, R is still liable to defending a civil action brought by the Commission, the U. S. Attorney General or the Charging Party."

* * * * *

"THE CONCILIATION CONFERENCE
([¶ 1291]

64.1 **Preliminary Remarks** - The conciliator, after describing the Commission's procedures from receipt of the charge through the investigation and reasonable cause determination, should explain the following:

(a) that the Commission is seeking a written agreement which remedies the violation and provides appropriate relief for CP and other similarly situated person.

(b) the agreement will contain a waiver of the CP's right-to-sue where the CP is a party signatory;

(c) that if an agreement acceptable to the Commission is obtained, the matter will not be referred to the Attorney General or the EEOC;

(d) that no admission of the violation is necessary in order to make a settlement and none is presumed;

(e) that conciliation efforts are confidential under the Commission's procedural Regulation's and under the statute; and

(f) that it is advantageous for R [employer] to settle through conciliation thus avoiding a lawsuit, adverse publicity and extra expense accompanying such action."

2. Right to Sue, Absent Conciliation

The statutory notice of right to sue as a jurisdictional prerequisite to suit by a private party is contained in the Civil Rights Act within Sec. 706(f)(1), 42 U.S.C. §2000e-5(f)(1).

". . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . ."

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2109

D. C. Docket No. CA-72-106

LUTTRELL B. COX,
Plaintiff,

SHERWOOD COX,
Plaintiff-Appellant,

ALVIN P. LOCKETT, SR., ET AL.,
Plaintiffs-Intervenors,

ANTHONY WHITE and HENRY CLARK, SR.,
Plaintiffs-Intervenors Appellants,

versus

ALLIED CHEMICAL CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

Before TUTTLE, AINSWORTH and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-intervenors appellants, the costs on appeal to be taxed by the Clerk of this Court.

September 15, 1976

Issued as Mandate:

Supreme Court, U. S.
FILED
SEP 8 - 1977
MICHAEL

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-97

ALLIED CHEMICAL CORPORATION,
Petitioner,

vs.

ANTHONY WHITE and HENRY CLARK, SR.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Dated: September 8, 1977

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-97

ALLIED CHEMICAL CORPORATION,
Petitioner,

vs.

ANTHONY WHITE and HENRY CLARK, SR.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

QUESTION PRESENTED.

Whether an employee aggrieved by discriminatory employment practices made unlawful by Title VII of the Civil Rights Act of 1964 has a right to a hearing to set aside his assent to an Equal Employment Opportunity Commission Conciliation Agreement on the grounds that the assent was not made voluntarily.

ARGUMENT

A. The Decision of the Court of Appeals Is Clearly Correct.

In its decision, the Court of Appeals held that the District Court should have conducted a hearing into whether the prospective intervenors had knowingly waived their right to sue under Title VII, relying upon this Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), where it was held that in the face of a claim of waiver of the right to sue under Title VII, "a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." Alexander v. Gardner-Denver Co., supra, 415 U.S. at 52 n.15. That statement is a reflection of this Court's consistent position down through the years on the question of waiver, i.e., that a valid waiver must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see also Gardner v. Florida, 97 S.Ct. 1197, 1206-07 (1977); Barker v. Wingo, 412 U.S. 218, 235-37 (1973); Fay v. Noia, 372 U.S. 391, 439 (1963). The intervenors should be given a chance to show that their assent to the conciliation agreement was not made knowingly or intentionally. Cf. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959).

B. This Case Is Not Ripe for Certiorari.

The present posture of this case is a classic example of an interlocutory appeal. The only issue resolved by the Court of Appeals is whether the intervenors are entitled to a hearing on the voluntariness of their assent to the conciliation agreement.

The Court of Appeals did not lay down any guidelines as to the applicable legal standard to be followed, or what would be the contours of the burden of proof; it merely decided that respondents should be given a hearing on the voluntariness question. The case has been remanded for further proceedings along that line, and in similar instances, this Court has declined to grant certiorari because of unresolved factual issues. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Arostook R.R., 389 U.S. 327, 328 (1967); American Construction Co. v. Jacksonville, Tampa & Key West Ry., 148 U.S. 372, 384 (1893).

The possibility for these potential issues to develop as this case goes along does not make it proper for petitioner to seek an advisory opinion from this Court as to what its position would be on these questions. See, e.g., Kremens v. Bartley, 97 S.Ct. 1709, 1717-19 (1977). Despite petitioner's hyperbole as to the consequences of the decision of the Court of Appeals, if upon remand the District Court finds that there has not in fact been a waiver of Title VII rights, petitioner would have no injury to complain about, and it would be the turn of respondents to have recourse to the appellate courts as to the correctness of the legal standard applied. In the present posture of the case, however, there is only the failure of the District Court to hold a hearing on the waiver, and although petitioner strenuously argues in its petition that the Court of Appeals did not indulge in the presumption of administrative regularity, nor did it take adequate notice of the complex nature of most conciliation

agreements, Petition for Certiorari, pp. 8, 11, passim, none of these issues were the subject of independent consideration by the courts below, and thus cannot be raised here. Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District, 429 U.S. 651, 652-53 (1977); Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 235 n. 7 (1976). Petitioner cannot frame any questions in its petition which were not in fact presented in the record below. See, e.g., Belcher v. Stengel, 429 U.S. 118, 119-20 (1976).

The same holds true for petitioner's contention that no right-to-sue notice was issued to the prospective intervenors, White and Clark. There is nothing in the record below to support such an asseveration, and petitioner cannot be allowed to bring it up at this late stage in the game. See, e.g., Youakim v. Miller, 425 U.S. 231, 235-36 (1976); Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972). Even assuming, arguendo, that notice of the right to sue had been issued, the intervenors also sue under 42 U.S.C. §1981, which certainly is not covered under the terms of the waiver set out in the conciliation agreement, see Petition for Certiorari, p. 3, since the waiver covers only rights suable under Title VII, whose remedies and procedures are discrete from § 1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

CONCLUSION

For the above and foregoing reasons, respondents respectfully request this Court to deny petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

September 8, 1977

Donald Juneau

Counsel for Respondents.

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Washington, D.C. 20006.

Supreme Court, U. S.
FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-97

ALLIED CHEMICAL CORPORATION
Petitioner

v.

ANTHONY WHITE and HENRY CLARK, SR.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. 77-97

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents raised two points in their Brief in Opposition to which we reply herein. They suggest that this case is not ripe for certiorari because the Court of Appeals did not "lay down any guidelines as to the legal standards to be followed" on remand (Opp. p. 3). They further, and inconsistently, argue that the Court of Appeals set down the proper guidelines, even though these guidelines are the strict standards established for waiver of constitutional rights rather than assert an agreement not to sue as part of a Congressionally encouraged conciliation agreement. Both arguments are unfounded.*

---

* Respondents also argued (Opp. p. 2) that the decision below is a proper application of the holding of the Court in **Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974)**. This contention is answered in our petition (pp. 7-9).

1. **Ripeness.**

Respondents' argument that the Court of Appeals did not establish "any guidelines as to the applicable legal standards to be followed" on remand misconstrues the decision of the Court of Appeals. Indeed, the Court of Appeals did lay down a standard. It has required a hearing "to determine whether in fact [Respondents] comprehended the rights they were relinquishing." (Pet. App. A-7) The Court of Appeals thus has adopted a standard related to each individual's "comprehension in fact". This standard, applied to a complex agreement between an employer, a union, a government agency and a multitude of employees is, we submit, unworkable. The effect of this holding, as we pointed out in our petition (pp. 5-11), is to require factual hearings on the mere allegations of any signatory that he did not fully understand what he was giving up. Conciliation agreements thus become an invitation to litigation whenever the shoe pinches, rather than an end to litigation. In any event, the standard is ripe for this Court's review.

The cases cited by Respondents on the issue of ripeness are not in point. None of them deals with the situation in which a remand for a hearing may jeopardize a congressionally established plan for the settlement of disputes or a situation in which the standard for remand itself is at issue. A better guide for the Court is *United States v. General Motors Corporation*, 323 U.S. 373, 377 (1945) in which the Court issued a writ of certiorari to correct the Court of Appeals' interpretation of law before permitting remand to the district court for factual findings. See also *Austin Independent School District v. United States*, 429 U.S. 990 (1976), in which the Court of Appeals had ordered the remand to the district court for the development of a comprehensive desegregation plan. This Court granted certiorari, summarily vacating the judgment, and remanded the case for further consideration in light of a subsequent decision.†

2. **Standard for Assent to Conciliation Agreement.**

Respondents, like the Court of Appeals, assumed that the proper standard for reviewing assent to a Title VII conciliation agreement is the same as the standards developed for reviewing waivers of constitutional rights. To the contrary, the application of such strict constitutional standards seems particularly inapposite to assent to a conciliation agreement, since any waiver is of a statutory procedural right, not a constitutional right, and is part of the congressional policy of encouraging settlement through conciliation.

The cases cited by Respondents all deal with the waiver of constitutional rights to a fair criminal trial. *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Gardner v. Florida*, 430 U.S. 349 (1977), are both concerned with the waiver of the right to counsel. *Barber v. Wingo*, 407 U.S. 514 (1972) (cited incorrectly as 412 U.S. 218) concerned waiver of the right to a speedy trial and *Fay v. Noia*, 372 U.S. 391 (1963) waiver of the right to appeal and in which one of the issues would be voluntariness of a confession.

This Court has applied lesser standard than that adopted by the Court of Appeals (comprehension in fact) even as to waivers of certain constitutional rights. Thus in *Schenchloth*

† Respondents' brief further implies (Opp. p. 4) that certiorari is premature at least as to the lack of a right to sue notice because "the waiver covers only rights sueable under Title VII" as distinguished from those under 42 U.S.C. § 1981. This is factually incorrect. The release of the conciliation agreement provides:

> "The Charging Parties hereby waive, release, and covenant not to sue Respondent Company and/or Respondent Union with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission . . ." [Pet. App. C-8]

". . . [T]he remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981,...", H.R.Rep.No. 92-238, p. 19 (1971), U.S. Code Cong. & Admin. News, 1972, pp. 2137, 2154.

v. Bustamonte, 412 U.S. 218 (1973), this Court stated (at 237):

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the constitution guarantees to a criminal defendant in order to preserve a fair trial. [footnote omitted]

The Court found a "vast difference" (*id.* at 241) between the rights "that protect a fair criminal tral and rights guaranteed under the Fourth Amendment." The Court thus rejected the "knowing and intelligent waiver" test as the test for waivers of Fourth Amendment rights and considered instead whether there had been "inheritently coercive tactics" (*id.* at 247). Here there is not even any suggestion of coercive tactics against Respondents.

* * *

The standard for withdrawing from assent to a Title VII conciliation agreement should be determined by this Court. We respectfully submit that the petition for writ of certiorari should be granted herein.

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PROOF OF SERVICE

I, Victor A. Sachse, III, attorney for Allied Chemical Corporation, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of September, 1977, I served the foregoing reply brief, on Anthony White and Henry Clark, Sr., respondents in connection with this application for a writ of certiorari, by mailing three copies thereof to their counsel of record, Donald Juneau, Esq., Suite 501, 910 17th Street, N.W., Washington, D.C. 20006, and on Local 216, International Union of Operating Engineers, AFL-CIO, by mailing three copies thereof to its counsel of record, James D. Thomas, II, Esq., 429 Government Street, Baton Rouge, Louisiana 70802.

s/ Victor A. Sachse, III

VICTOR A. SACHSE, III

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No. 77-97

In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

ANTHONY WHITE AND HENRY CLARK, SR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of October 3, 1977, inviting the Solicitor General to express the views of the United States with respect to this case.

This suit arises out of a complaint filed by respondents seeking to intervene as plaintiffs in a successful suit against petitioner Allied Chemical Corporation challenging a seniority system as violative of Title VII of the Civil Rights Act of 1964. During a reduction-in-force, respondents were laid off pursuant to the application of the challenged seniority system and sought back pay relief similar to that obtained by the named plaintiffs. The challenged layoffs had occurred soon after the signing of a conciliation agreement with the Equal Employment Opportunity Commission, and Allied Chemical moved to

dismiss respondents' intervention complaint on the ground that respondents had signed the agreement which contained a clause waiving their right to sue. The district court dismissed the action stating (Pet. App. D-2):

> The gist of the intervenors' position is that they entered into the EEOC agreement without proper legal advice and that they were not advised at the time of available alternate procedures. We do not believe that this is sufficient grounds for the intervenors to ignore the EEOC agreement and attempt to pursue this litigation.

The court of appeals reversed. Finding "at least some evidence before the [district] court * * * that the waivers were signed with less than full knowledge of the bargain that was being struck" (Pet. App. A-7 n. 5), the court of appeals remanded the case to the district court for a hearing to determine whether the intervenors "knowingly and voluntarily" waived their rights by signing the conciliation agreement (Pet. App. A-7).

1. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 n.15, this Court stated that a district court faced with an asserted waiver of rights granted by Title VII should determine "at the outset that the employee's consent to the settlement was voluntary and knowing." The courts of appeals thus far have had little occasion to consider the application of this requirement in concrete situations, although the Court of Appeals for the Fifth Circuit has held that the proponent of a Title VII release must meet the "classic test" by showing that the release " 'was executed freely, without deception or coercion, and that it was made * * * with full understanding of [the waived] rights.' " *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 861. The requirement that knowing and voluntary action precondition any forfeiture of Title

VII rights is appropriate because of the fundamental importance of equal employment guarantees. On the other hand, requirements aimed principally at the dangers of deception and coercion cannot be utilized lightly to upset settlement agreements negotiated in good faith by all parties. Conciliation and negotiation are the "preferred means" of resolving Title VII claims. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 44. The Equal Employment Opportunity Commission negotiates approximately 7,000 such conciliation agreements each year and all those who are affected by Title VII have an interest in preserving the viability of the conciliation process, which depends in part upon the finality of negotiated settlement agreements. This tension between the requirement of legitimacy in the waiver process and the need for dependable finality in settlement agreements imposes special responsibilities upon the district courts in ruling on claims by persons who have signed waiver agreements.

2. In the instant case, respondents who were signatories to a negotiated Title VII settlement sought to intervene in a subsequent private Title VII action claiming that their written waiver of Title VII claims against petitioner was not knowing and voluntary within the meaning of *Alexander* v. *Gardner-Denver Co., supra*. Because of the way in which the issue was litigated in the district court, the specific nature of respondents' claims has not yet been clarified. The complaint in intervention filed by respondents did not address their waiver claim, and it was not adequately illuminated by the parties in depositions or subsequent written motions. As the court of appeals noted, there is some evidence in the record indicating that "the waivers were signed with less than full knowledge of the bargain * * * being struck" (Pet. App. A-7). However, there is nothing to indicate whether this lack of

knowledge is allegedly the result of deception, failure of the Commission attorneys to explain the settlement, ambiguity in the document or waiver provision itself, or respondents' failure to make any effort to understand the agreement they signed. It therefore cannot be determined on the present record whether in fact respondents have presented the type of claim that might render their signed waiver inoperative under the standard announced in *Gardner-Denver*.

Without obtaining a more precise understanding of the cause of respondents' alleged lack of knowledge, the district court dismissed their intervention complaint based upon its view of the "gist of the intervenors' position" and its conclusion that the purpose of conciliation agreements is to avoid further litigation (Pet. App. D-2). The court of appeals correctly found this precipitous disposition inappropriate "[i]n light of the recently— expressed deep concern [in *Alexander* v. *Gardner-Denver Co.*, *supra*, and *Watkins* v. *Scott Paper Co.*, 530 F. 2d 1159 (C.A. 5)] over the necessity for establishing voluntariness before finding an effective waiver of * * * plaintiff's Title VII rights" (Pet. App. A-7). In light of the district court's peremptory disposition, as well as some evidence that respondents lacked knowledge of the agreement they signed, the court of appeals did not exceed its authority in requiring the district court to hold a hearing to determine whether the waiver was "knowing and voluntary." A hearing at which the district court can determine the reasons for the claimed misunderstanding is not only appropriate for a proper initial determination on the waiver issue, but also will facilitate any subsequent review by the court of appeals or by this Court.

Petitioner claims (Pet. 8), however, that the opinion of the court of appeals "would now permit a vast backlog of complex conciliation agreements to be reopened on the

allegation that a party thereto did not fully understand the benefits he or she got, or did not get, under the agreement." This contention rests upon a single sentence in the opinion that states "the district court erred in dismissing the complaints in intervention * * * without * * * holding a hearing to determine whether in fact they comprehended the rights they were relinquishing when they signed the October 1971 EEOC conciliation agreement" (Pet. App. A-7). While the sentence is not without ambiguity, it need not, and should not, be read out of the factual context of this case in which the presence of evidence of misunderstanding was combined with precipitous disposition of still undefined claims that important rights were invalidly waived. The opinion does not require a hearing in every case in which claims are made that settlement agreements were not knowing or voluntary. If the district court, through discovery, the pleading process or other means, had precisely defined the claims before it as involving nothing more than a failure to comprehend a complex agreement, summary disposition would not have been improper. The opinion of the court of appeals is not to the contrary, and that court's refusal to permit precipitous dismissal of respondents' half-understood claims therefore does not merit further review by this Court.

Finally, as petitioner acknowledges, the court of appeals' opinion "fail[s] to set any substantive standards for such hearings" (Pet. 11). Indeed, the court of appeals simply tracks the language of this Court in stating that on remand the district court should determine whether "the intervenors did not knowingly and voluntarily waive their rights" (Pet. App. A-7). If the hearing in the district court shows no more than a lack of understanding, the district court should dismiss respondents' complaint in intervention in light of the explicit waiver of Title VII rights they

signed. Our reading of the record thus far developed suggests no reason to anticipate any other result.

3. Our conclusion that neither the court of appeals' decision here nor this Court's decision in *Gardner-Denver* requires the employer to prove "that each employee [actually] understood * * * the conciliation agreement which had been negotiated * * * under the close supervision of the EEOC" (Pet. App. B-2), does not mean that we agree with petitioner that the sole grounds for declaring a waiver inoperative would be "fraud or substantial wrongdoing by EEOC" (Pet. 6). For example, there may well be situations where the ambiguity of waiver clauses and the inadequacy of explanations offered by attorneys would void a waiver of Title VII rights in the absence of claims of fraud or substantial wrongdoing. See *Watkins* v. *Scott Paper Co.*, 530 F. 2d 1159, 1170-1172 (C.A. 5), certiorari denied, 429 U.S. 861. The courts of appeals have not yet had occasion to apply the knowing and voluntary requirement to many such claims. The lack of cases suggests that there may be little need to consider the application of that standard now, before the courts have dealt with the question in a variety of circumstances.

This case, moreover, presents the question of the appropriate standard for reviewing waiver claims in only hypothetical form on the present undeveloped record. The court of appeals' opinion is brief and unspecific; it essentially requires the district court to make its decision based upon this Court's language in *Gardner-Denver*. The district court may well reject respondents' attempt to void their waiver, and thereby perhaps eliminate the need for further consideration of the issue here. The interlocutory posture of the case therefore makes it inappropriate for review at this time. Should the district court apply an incorrect standard in considering respondents' claim, further appellate review would be available.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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